No. 06-989

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

—v.—

MATTEL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the American Arbitration Association ("AAA"), is a not–for–profit, public service organization founded in 1926, after Congress's enactment of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. Today, the AAA is the largest provider of dispute resolution services in the world. From the time it was founded, the AAA has administered over two million domestic and international disputes arising out of collective bargaining agreements and commercial matters. The AAA is also active in educating the public and potential users about various forms of alternative dispute resolution, and conducts comprehensive training for arbitrators and mediators. The AAA has offices located throughout the United States and in Dublin, Ireland, Singapore, and Mexico City.

The AAA's preeminent position in administering arbitrations renders it uniquely qualified to provide a perspective it hopes will assist the Court in its consideration of the merits of this appeal. The AAA believes strongly in the continued development of arbitration as a prompt and cost–effective method of

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

resolving disputes. Through its extensive experience in administering arbitrations, the AAA can offer insight into the practical impact on the arbitration process of a decision permitting parties to contract for expanded standards of judicial review. Accordingly, the AAA respectfully files this brief as *amicus curiae* to urge this Court to affirm the decision of the Ninth Circuit Court of Appeals.

The AAA has previously filed *amicus curiae* briefs in many of the arbitration–related cases heard by the Court, including *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto–Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *UBC Southern Council of Indus. Workers, Local Union No. 2713 v. Bruce Hardwood Floors*, 522 U.S. 928 (1997); *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U. S. 79 (2000); and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal requires the Court to consider two valuable characteristics of arbitration, both of which the Court has supported in prior decisions: party autonomy, on the one hand, and economy and finality, on the other. *Amicus* strongly supports both principles and believes that this case does not require the Court to choose between them.

As reflected in the prior decisions of this Court and in the structure of the FAA, party autonomy extends to the full scope of the arbitration process, but does not expand into the judicial oversight of arbitration that has been carefully circumscribed by Congress. Therefore, in affirming the decision below, the Court can respect party autonomy in arbitration while strengthening the principle of finality in order to preserve the essential nature of arbitration as an expeditious, predictable, and private alternative to litigation.

Amicus firmly believes that the system of arbitration that has developed as a result of the FAA should be preserved. Permitting enhanced judicial review by contract would not only eviscerate the principle of finality in individual cases, but would likely transform arbitration into traditional litigation. If procedural efficiencies in arbitration were lost and if courts increasingly intervened in the

process, the value of arbitration would inevitably decline.

Indeed, one of the key principles driving passage of the FAA was that the finality of arbitration awards was essential to ensuring the effectiveness of this alternative form of private dispute resolution. For this reason, Congress expressly limited the role of courts in the arbitration process, including mandating that courts confirm arbitral awards except in very narrow instances. *Amicus* thus believes that to interpret the FAA in a manner that undermines the goals of finality and independence would contravene the rationale and plain terms of the FAA.

Permitting parties to dictate to courts which standard of review they should apply would also be a potentially unconstitutional delegation of Congress's authority to regulate the federal courts. Only Congress should be able to alter the standard of judicial review set forth in the FAA. Moreover, the ability of parties to contract for a second layer of arbitral review through the arbitration process should alleviate any concern about access to an appellate review mechanism.

Notably, international conventions and most other nations' statutes governing arbitration are in line with the FAA in strongly favoring a limited role of courts in arbitration. To the knowledge of *Amicus*, none permits parties to craft their own standards of judicial review of arbitral awards.

ARGUMENT

I. Enforcement of Agreements for Expanded Judicial Review of Arbitration Awards Would Erode the Benefits of the Arbitral Process, Frustrate Congress's Intent to Limit Judicial Intervention Into Arbitration Awards, and Violate the Plain Terms of the FAA.

This Court has recognized that Congress sought to protect the independence of the arbitral process by preserving the integrity of arbitral awards against judicial interference. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (referring to Congress's intent to establish a system of "final, binding arbitration"). The FAA thus confines courts' review of arbitration awards to carefully prescribed grounds; this structure leaves no uncertainty about Congress's intent to preserve the final and binding nature of arbitral awards.

Amicus believes that allowing parties to rewrite the FAA to permit enhanced and diverging standards of judicial review of arbitration awards would lead to the erosion of many of the benefits of the arbitral process as envisioned in the FAA. It would also contravene the rationale and plain terms of the FAA, which severely limits the grounds for such review.

This Court has also recognized that the FAA embodies a strong national policy favoring arbitration, which reflects Congress's intent that private arbitration agreements be enforced according

to their terms. *See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (observing that the FAA "requires courts to enforce privately negotiated agreements to arbitrate"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (holding that the ultimate purpose of the FAA is enforcement of the right to contract for arbitration).

Amicus fully supports the principle of party autonomy. However, as the *Volt* and *Byrd* cases demonstrate, this principle of autonomy applies to the arbitration process itself, and not beyond it to the scope of judicial scrutiny of awards. Nothing in the FAA or in this Court's prior decisions would suggest that party autonomy ought to extend to the role of the courts themselves.

A. Permitting Parties to Agree to Expanded Judicial Review Would Fundamentally Undermine the Arbitral Process.

One of the cornerstone principles of arbitration endorsed by Congress is that awards rendered by arbitrators are final and binding. If parties are allowed to contract for expanded judicial review of arbitration awards, arbitration will become a prelude to litigation, instead of a substitute for it. As discussed more fully below, in order to protect the independence of arbitration, the FAA sets forth a bright line that defines the respective roles of courts and arbitrators and ensures the finality of arbitral awards in all but the narrowest of circumstances.

Absent substantial respect for these defined roles, *Amicus* believes the unique characteristics of arbitration will be substantially undermined and replaced by proceedings similar to traditional litigation. As one court has observed, to compromise the finality of arbitral awards would be to "transform a binding process into a purely advisory one." *United States Postal Serv. v. American Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotations omitted); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (observing that "a restrictive standard of review is necessary to . . . prevent arbitration from becoming a preliminary step to judicial resolution") (internal quotations omitted).

Since passage of the FAA, the availability of arbitration has transformed the landscape of dispute resolution by providing parties with effective means of resolving disputes largely outside the judicial system. Some of the benefits of arbitration include elimination of burden on the courts, the ability to select a decision–maker with expertise in the subject matter at issue, cost reduction, efficiency and rapid resolution, and flexibility in crafting procedures by which the arbitration will be conducted. Last year alone, *Amicus* administered over 137,000 cases, the large majority of them arbitrations. But for the availability of the arbitral process made possible by the FAA, these disputes would have been litigated in the courts.

Some of the principal features of arbitration are flexible evidentiary standards and discovery requirements. *See, e.g.*, AAA Commercial Arbitration Rules, R–31(a) ("Conformity to legal rules of evidence shall not be necessary."); R–31(b) ("The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."). Furthermore, in typical commercial proceedings administered by *Amicus*, an arbitrator need not render a reasoned decision "unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." *Id.*, R–42. Arbitral decisions in proceedings administered by *Amicus* are to be rendered within thirty days from the close of proceedings, further reinforcing the expeditious nature of this form of alternative dispute resolution. *See id.*, R–41.

If contractual provisions for expanded judicial review are permitted by this Court, parties will be free to demand that courts engage in detailed review of the merits of the case. The layering of public and private dispute resolution would transform arbitral bodies into mini–district courts and federal district courts into quasi–appellate tribunals. Though this may be the arrangement to which some parties would agree, it plainly does not comport with Congress's denial of substantive review of arbitral awards, and it contravenes a fundamental principle of arbitration: to provide parties with a quick and

cost–effective method of resolving disputes. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (noting that enhanced review "threaten[s] to undermine the independence of the arbitration process and [to] dilute the finality of arbitration awards").

Amicus believes that, facing the prospect of enhanced judicial scrutiny, arbitrators will feel obliged to conduct the arbitration in a manner similar to traditional litigation. For instance, arbitrators are likely to demand more formalized evidentiary procedures and findings of fact, and feel compelled to create a record and a reasoned decision that will withstand court review. In turn, in the absence of a reasoned decision and complete and interpretable record, a district court tasked with applying a more searching legal or factual review of an arbitrator's award will likely demand more thorough briefing and submissions from the parties, which could effectively mean re–trying issues already decided by the arbitral tribunal.

Moreover, if Section 10 of the FAA is construed as optional, parties will be free to negotiate review standards of every stripe and color. The creation of a patchwork of standards for court review of arbitration awards under the FAA will in turn introduce confusion and uncertainty for individual arbitrators in the conduct of their proceedings. Arbitrators, as well as courts, will be required to interpret the varying applicable standards of review,

and consequently attempt to modify their conduct in light of those individual standards.

In turn, the meaning and scope of contractual provisions for judicial review would themselves become subject to judicial challenge, and would provide an invitation for additional litigation about procedural, not substantive, matters. District courts would be required to assess the standard of review in the parties' agreement using traditional methods of interpretation, including determining party intent where a contract is otherwise unclear. The interpretation and application of the standard of review would then be subject to challenge on appeal, resulting in further delay and expense for the parties and requiring more of the courts' limited time. Courts of appeals would have to invent standards for reviewing a district court's review of an arbitration award for errors of law, if a district judge were to be permitted to undertake such a review. Because the parties would be free to adopt a standard of review that contains language similar to Sections 10 or 11 of the FAA, a court's interpretation of such a standard may also lead to confusion about the meaning and scope of the statutory standards. Confusion would only increase as courts interpreted and applied additional privately negotiated standards of review. This multi–layered result would lie in direct opposition to the FAA's goal of cultivating efficient and less costly dispute resolution through finality and limited judicial involvement.

Preparing arbitrators for situations in which expanded judicial review is the norm would also create difficulties from an institutional perspective. The AAA requires mandatory training to ensure that its arbitrators possess the requisite case management ability, knowledge of the AAA's rules and standards, and legal competence. It will become more difficult to ensure that arbitrators are properly trained if their training must also encompass constantly shifting standards of judicial review.

The proceedings below between the parties, Hall Street and Mattel, illustrate the negative impact of enhanced judicial review on the arbitral process. In exercising *de novo* legal review of the arbitrator's decision, as provided for in the parties' agreement, the district court interpreted the disputed contractual provision differently than did the arbitrator. The court then remanded to the arbitrator for further consideration. After the arbitrator rendered a revised decision, the parties once again sought judicial review of that decision before the district court, launching a series of appeals and remands that lasted another three years.

Enhanced review thus threatens to transform district courts from a safeguard against procedural irregularities into an appellate court sitting in judgment on the merits. The results will be burden on the courts, prolonged and costly arbitrations, and, ultimately, erosion of the effectiveness of arbitration as an independent and efficient alternative dispute

resolution mechanism. Such a result would be directly contrary to Congress's intent to facilitate an effective arbitration process. *See Volt*, 489 U.S. at 478 (citing Congressional awareness "that the Act would encourage the expeditious resolution of disputes"); *Byrd*, 470 U.S. at 219 (recognizing "the Act's goal of speedy and efficient decision-making").

B. As Congress Recognized in Enacting the FAA, the Effectiveness of the Arbitration Process Depends Upon the Clear Separation of the Arbitration and Judicial Processes.

The FAA was passed in 1925 to ensure judicial support for arbitration by rendering contractual arbitration agreements enforceable in U.S. courts. H.R. REP. NO. 68-96, at 1 (1924). Congressional supporters of the FAA consistently cited the finality of awards and the resulting reduction in delay and expense as among the primary benefits of arbitration. *Id.* at 2. (arguing that "interference by the court" will be lessened by requiring enforcement of arbitration agreements and limiting the grounds for attack); S. REP. NO. 68-536, at 3 (1924) (justifying arbitration as a method "to avoid the delay and expense of litigation").

These considerations helped ensure the widespread support of the FAA at its passage. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270-71 (1925) (noting that challenges to arbitration awards

meant that "the delay in finally recovering judgment was substantially as great as through action had been brought upon the original dispute") [hereinafter Cohen & Dayton]; Justice Charles L. Guy, Speech Before the League of Women Voters (March 2, 1925), *quoted in The Arbitration Movement*, 5 BUS. L.J. 257, 260 (1925) (asserting that one of the central benefits of arbitration is the finality of the award except in cases of "fraud or gross misconduct").

Congress's desire to make effective a system of independent and expeditious dispute resolution was reflected in the terms of the FAA itself, which were crafted so as to preserve the independence of arbitration from judicial interference. Cohen & Dayton, *supra*, at 273 (observing that the Act is framed so that "[t]here is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been"). Absent such finality, the benefit of the arbitrator's specialized expertise would be lost. *See* Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 AM. BAR ASSOC. J. 153, 155 (1925) (explaining that often "the judge or the jury is not and cannot be made familiar with the peculiarities of the given controversy").

In order to achieve these goals, Congress created a partnership between courts and arbitration, pursuant to which arbitrators decide how an arbitration shall be conducted, as well as the merits of a controversy, and courts provide oversight for

certain enumerated issues that may arise in the course of an arbitration. Notably, the role of courts in the conduct of an arbitration is confined to ensuring enforcement of the parties' agreement to arbitrate.[2] *See* H.R. REP NO. 68-96, at 2 (1924) ("Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court.").

The provisions that become effective once the arbitration award is rendered also carefully circumscribe the court's role. Section 9 of the FAA governs a court's treatment of arbitral awards once rendered. It requires that a court "must" grant an order confirming the award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (2000). This language is clear and unequivocal: when the FAA applies, courts must enforce arbitral decisions so long as those awards do not qualify for vacatur or modification as defined by the Act. Sections 9, 10 and 11 contain no language directing district courts to follow the terms of the parties' agreement when confirming, vacating, or modifying an award. *Cf. id.*

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[2] For example, the FAA authorizes courts to issue a stay of litigation pending an arbitral decision (9 U.S.C. § 3), to compel arbitration if provided for in a written agreement (*id.* § 4), to appoint arbitrators if not otherwise specified (*id.* § 5), and to compel attendance of witnesses at arbitral hearings (*id.* § 7).

§ 4 (permitting a motion to compel arbitration "in the manner provided for in [an] agreement").

Section 10 of the FAA in turn sets forth the four grounds by which courts "may" vacate an arbitral award. *Id.* § 10.[3] The enumeration of four specific grounds for vacatur strongly implies that the potential grounds for vacatur are limited. This is particularly true in light of Section 9's command that courts confirm arbitral awards *except as* provided for in Sections 10 and 11.[4] Each of the grounds for

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[3] *See* 9 U.S.C. § 10(a)(1) ("where the award was procured by corruption, fraud, or undue means"); *id.* § 10(a)(2) ("where there was evident partiality or corruption in the arbitrators"); *id.* § 10(a)(3) ("where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy . . . [or] any other misbehavior by which the rights of any party have been prejudiced"); *id.* § 10(a)(4) ("where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made").

[4] The use of the word "may" in Section 10 demonstrates that a court need not vacate an arbitral award even if one of the four specified grounds exists. *Cf. In re Chromalloy Aeroservices*, 939 F. Supp. 907, 909 (D.D.C. 1996) (noting that, in the similar statutory context of the provisions enacting the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 9 U.S.C. §§ 201–08, a court retains discretion not to vacate an award even when a statutory ground for vacatur exists).

vacatur of arbitration awards set forth in Section 10(a) protects the integrity of the arbitration process; none permits review of the substance of an arbitrator's decision. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990) (observing that the FAA "carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways . . . [and] contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal [errors]").

Despite attempts by some parties to contravene the plain terms of the FAA by seeking substantive judicial review following an adverse arbitral ruling, this Court has authorized lower courts to set aside arbitral awards "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). The lower courts have accordingly resisted any temptation to interpret Section 10(a) broadly. *See, e.g., Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991) (noting that courts have "consistently accorded the narrowest reading" to section 10(a)(4)).

Some lower courts, based on this Court's dictum in *Wilko v. Swan*, 346 U.S. 427 (1953), have permitted vacatur where an arbitrator has demonstrated "manifest disregard" of the law. *Id.* at 436. This Court has never explicitly endorsed this

judicially created ground for vacatur, and in fact has observed that a common–law exception to Section 10(a) would be "difficult to reconcile . . . with this Court's subsequent decisions involving the Arbitration Act." *Shearson/American Express, Inc.*, 482 U.S. at 231–32. However, even if this Court were to endorse certain judicially created doctrines, they would still remain qualitatively different from party–created standards of review, which would be infinite, inconsistent, and more difficult to apply. *See* Sec. A, *supra*.

Moreover, in contrast to other statutes, Congress has not equipped courts to "provide the same judicial review [to arbitration decisions as that] given to structured judgments defined by procedural rules and legal principles." *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (internal quotations omitted).[5] The FAA's procedural directives do not contemplate a system of quasi–appellate review of arbitral decisions by district courts outside the narrow review provided for in Sections 9, 10, and 11. This lack of procedural guidance would prove particularly onerous in the

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[5] Compare the Social Security Act, for example, in which Congress has provided detailed procedural guidelines to govern substantive judicial review of the decisions of Administrative Law Judges, including the requirement of a written record. *See* 42 U.S.C. § 405(g). Similarly, the Administrative Procedure Act sets forth specific procedures governing a district court's review of an agency's action. *See, e.g.*, 5 U.S.C. § 611.

case of arbitral awards, which are generally not required to be set forth in a reasoned opinion.

C. The FAA's Respect for Party Autonomy Does Not Create a Right to Contract for an Alternative Judicial Standard of Review.

Amicus believes that the principle of party autonomy is important to the effective functioning of arbitration. Yet, this principle must be understood in light of the separation, described above, between the arbitration process and the FAA's carefully defined judicial procedures.

The ability of parties to use the flexibility of the arbitration process to tailor procedures to each case is one of the advantages of arbitration. The FAA embodies this principle, as it sets out very few mandatory procedures in the arbitration process. *Cf. Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983) (noting "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). This Court has recognized the importance of party autonomy, as it has held that arbitral provisions will be enforced according to their terms even when they lead to less efficient dispute resolution. *See, e.g., id.* at 20 (observing that FAA may require two claims arising out of the same facts to be heard in different fora); *Byrd*, 470 U.S. at 217 (holding that FAA requires courts to "compel

arbitration . . . even where the result would be . . . possibly inefficient").

This Court's prior holdings endorsing parties' freedom to determine procedures have concerned the arbitration process itself, however, not the scope of a court's review of the substance of an arbitral award. The agreements in those cases did not conflict with any clear and unequivocal provision of the FAA, and they did not require this Court to determine whether the parties' agreements were consistent with the FAA's policy of ensuring the finality of arbitration awards.

In *Volt*, for instance, the question was whether a state procedural rule, to which the parties had agreed by contract, conflicted with the policies and objectives of the FAA. *Volt*, 489 U.S. at 475–76. Because the contracted–for rule did not "[do] violence to the policies behind" the FAA, this Court held that the state procedural rule for which the parties had contracted should be enforced. *Id.* at 479; *see also Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (parties may decide which issues shall be subject to arbitration); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 87 (2002) (Thomas, J., concurring) (parties may decide the procedural rules applicable to the arbitration proceeding).

The FAA's endorsement of party autonomy and flexibility to decide the scope and procedure of the arbitration process is appropriate. However, as

shown in Section I.B above, the FAA does not grant parties the power to determine the rules applicable to the judicial review of the arbitral award, and none of this Court's prior decisions have held otherwise. Adhering to this distinction is important because permitting private parties to determine the scope of a court's legal and factual review of an arbitral decision would not only undermine the goals of the FAA and the effective functioning of the arbitration process, as shown in Section I.A. above, but would also raise serious questions of an unconstitutional delegation to private parties of Congress's power to regulate the practice and procedure of the courts.

As an exercise of its power, Congress may prescribe "how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate"; the procedural rules of the FAA are a proper exercise of this power. *Prima Paint Corp.*, 388 U.S. at 405; Federal Rule of Civil Procedure 81(a)(3). Congress may not, however, delegate its power to make law to private parties. *See Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."). Accordingly, this Court should apply the canon of constitutional avoidance and reject an interpretation that would raise such constitutional problems. *See DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here . . . construction of a statute would raise serious constitutional

problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.").

For these reasons, this Court can continue to respect and to encourage the principle of party autonomy while rejecting the idea that parties can agree to set judicial standards of review of arbitration awards. In so doing, the Court would also preserve the separateness and efficiency of the arbitration process.

D. Parties Seeking a Second Layer of Review of Arbitration Awards Are Free to Contract for an Arbitral Appellate Review Process.

If Congress wishes to afford parties a level of judicial review that differs from that mandated by the FAA, it is free to do so. Absent such action, parties desiring substantive appellate review of their arbitral award are free to contract for such review by an arbitral panel in the same manner that they contract for the arbitration itself. The FAA does not deny this right. *See, e.g., Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award."); Wharton Poor, Arbitration *Under the Federal Statute*, 36 Yale L. J. 667, 674–76 (1926–27) (observing that if parties desire expanded review, "the arbitration agreement could well be drawn to provide for a review by a board of appeal"). In addition, of course, if parties wish to have

procedural or substantive protection that they feel only a judge can provide, then they are free to appoint one or more judges as their arbitrator, and to so agree in their contract.

Amicus, for instance, offers a draft clause to parties who wish to contract for appeal to a second panel of arbitrators. Such parties have the freedom to establish the standard of review that will be applied by the appellate arbitration panel, including review for errors of law. *See* AAA Drafting Dispute Resolution Clause 27; *see also* United Nations Commission on International Trade Law ("UNCITRAL") Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary–General, Art. 34(1) cmt. 2. UN Doc A/CN.0/264 (noting that the UNCITRAL Model Law on International Commercial Arbitration does not limit parties' ability to contract for appeal to an arbitral tribunal, nor does it circumscribe the grounds upon which an award may be contested in such an appeal).[6]

The availability of arbitral appeal mechanisms should resolve any concerns the Court may have about parties' ability to seek redress for an arbitral

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[6] New York State also provides for arbitral appeal of awards rendered pursuant to its No-Fault Automobile Insurance Law. The sole recourse for modification or vacatur of an award is appeal to a master arbitrator, who may review the award on specified grounds, including for errors of law. *See* 11 N.Y.C.R.R. § 65–4.10.

ruling, should they desire to contract for such review. Notably, in the experience of *Amicus*, relatively few parties take advantage of the availability of appellate arbitral review. *Amicus* estimates that less than one percent of arbitration agreements submitted to it for administration contain provisions for appellate review. This reticence is likely due in part to the fact that such review directly undermines the primary considerations that drive parties to choose arbitration as a dispute resolution mechanism: expediency, finality, and cost-effectiveness.

II. Permitting Expanded Judicial Review of Arbitral Awards Would Put the United States At Odds with the International Arbitration Community.

As far as *Amicus* is aware, no country permits parties to create their own standards of judicial review of arbitration awards. To the contrary, international instruments such as the New York Convention explicitly discourage the involvement of courts by emphasizing the final and binding nature of arbitral awards and by limiting grounds for judicial review to serious procedural deficiencies.

Similar to the FAA, arbitration statutes of most countries, many of which track the UNCITRAL model law, provide for judicial review on strictly limited grounds.[7] Some countries even encourage parties to waive statutory provisions permitting limited judicial review or arbitral appeal by agreement, thus taking a step further toward ensuring the absolute finality of arbitral awards. *See, e.g.*, Hong Kong Arbitration Ordinance, Chapter 341, art. 23B(1) (1997); Peru, General Arbitration Law No. 26572, art. 60 (1996); Algerian Code of Civil Procedure, art. 446 (as amended by Legislative Decree No. 93-09 of 1993); Swiss Private International Law Act, art. 192 (1987); Argentine

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[7] Over 50 countries have adopted the UNCITRAL Model Law on International Commercial Arbitration, which provides in Article 34 that an arbitral award may only be set aside on certain exclusive and limited grounds.

National Code of Civil and Commercial Procedure, Law No. 17.454, Book 6, Title I, art. 741 (as consolidated by Decree 1.042 of 1981); Chile, Organic Law of the Judiciary, Law 7421, Title IX, art. 239 (1943). Even the few countries that contemplate the possibility of substantive appeal of an arbitration award in court by party agreement do not permit the parties to determine contractually the applicable standard of review. *See, e.g.*, English Arbitration Act, §69 (1996); Singapore Arbitration Act, art. 49 (2002); Belgian Judicial Code, Part Six, art. 1703(2) (1972).

The clear trend in the international arbitration community is toward less judicial interference with arbitral awards, not more. For example, the 1996 English Arbitration Act took steps to actively confine the scope of judicial review of arbitral awards that was previously available to narrowly defined and exhaustive grounds. *See* English Arbitration Act, §§ 67–69 (1996); *see also* Sir Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration: 2001 Companion Volume 51* (2d ed. 2001) (observing that the English Act greatly restricted recourse to courts because "a right to appeal is inimical to the philosophy of finality and despatch which imbues the 1996 Act").

In France, moreover, another of the world's leading arbitral jurisdictions, a contractual clause providing for judicial appellate review of an arbitral award in an international arbitration is considered void. *See* Emmanuel Gaillard & John Savage,

Fouchard Gaillard Goldman on International Commercial Arbitration, § 484 (1999) ("Another example [of a pathological clause] is an agreement that permits an appeal from the award before national courts in cases where the subject–matter is international."); Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 Am. Rev. Int'l Arb. 215, 218 (1999), *citing* Paris Court of Appeal, Dec. 12, 1989, *Societe Binate Maghreb v. Soc Screg Routes*, 1990 REV. ARB. 863.

International arbitration mechanisms reflect a strong belief in the finality of arbitral awards as a key component to the success of the arbitral system. A ruling by this Court in favor of permitting private parties to contract for expanded standards of judicial review would thus stand in contrast to established international standards and practice.

CONCLUSION

WHEREFORE, *Amicus* AAA respectfully urges the Court to affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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September 14, 2007

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